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## SOME REFLECTIONS ON THE LAW AS TO MONOPOLY OF TRADE.

**W**HEN Paul and the other apostles were brought before the Council of Israel for preaching the doctrines of Christ, contrary to the mandates of that body, Gamaliel, a Pharisee and a doctor of the law, stood up in the Council and said:

"Ye men of Israel, take heed to yourselves what ye intend to do as touching these men. \* \* \* And now I say unto you, Refrain from these men, and let them alone; for if this counsel or this work be of men, it will come to nought; but if it be of God, ye can not overthrow it; lest haply ye be found even to fight against God."

So the people agreed with him. And after they had beaten the apostles they let them go with a warning not to persist in their misconduct.

This is quite the way that the world has treated its evangels bearing any new message, in all lands and times. Nothing is more painful to the conventional mind than to be compelled to deal with a new idea.

There was a much more modern Legum Doctor who spoke with authority in similar vein and on a subject closely related to that of which I write:

"Commerce can not require anything which is unreasonable and unjust; but what experience shows that her convenience does require, that she will have, for it will still be adhered to by the common consent of the commercial world; and if the courts should refuse to enforce it with the few who refuse to conform to such a general custom, the moral sense of commercial men will apply its still more coercive influence, which few will withstand."<sup>1</sup>

This indeed is the true spirit of the common law which has always sought to recognize and follow the customs of the people, giving them, when not immoral, the force and sanction of law when long and generally pursued and fully ascertained.

The argument is that a trade combination, accomplished for the purpose of securing all the business possible, having no purpose otherwise unlawful, and wholly unaided by law in any monopoly which may be enjoyed, must stand or fall as an economic proposition.

It is no legitimate function of law to declare the illegality of such a combination nor to visit penalties upon those concerned in it.

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<sup>1</sup> Justice John D. Caton in *Munn v. Burch*, 25 Ill. 35.

Under normal conditions, it can only succeed if, on the whole, it gives customers more for their money than they can otherwise obtain. This is the Alpha and Omega of the trust problem; all else, court decisions, presidential proclamations, verbose legislation and platitudinous orations are but sounding brass. Hear the old Thunderer as he strikes his sledge-hammer blows at such current conventional humbug.

"Shiftiness, quirk, attorney cunning is a kind of thing that fancies itself, and is often fancied to be talent; but it is luckily mistaken in that. Succeed truly it does, what is called succeeding; even must in general succeed, if the dispensers of success be of due stupidity. Men of due stupidity will needs say to it, '*Thou art wisdom, rule thou!*' Whereupon it rules. But Nature answers, '*No, this ruling of thine is not according to my laws; thy wisdom was not wise enough. Dost thou take me too for a Quackery? For a conventionality and Attorneyism? This chaff that thou sowest into my bosom, though it pass at the poll booth and elsewhere for seed-corn, I will not grow wheat out of it, for it is chaff.*'"

It is idle to dispute that the essential idea of our familiar national statute against monopoly in trade is that efforts to interfere with the course of business either by combinations between rivals which tend to restrain trade or increase prices, or by the purchase of competing interests to get not only their tangibles but their clients or trade constituents, thus establishing a considerable measure of control in that field such as necessarily goes with large business, are criminal.

I do not know that this has been solemnly declared in so many words by any judicial wiseacre expounding this preposterous law. I presume it has been. It is said Lord HARDWICKE declared that in the Year Books a case could be found for any proposition. What would he have said of the Federal Reporter?

But whether this has been formally and judicially declared or not, it is the necessary conclusion from many decisions. Nor is this to be obscured by much prolix expatiation on the particular enormities perpetrated by various "bad" trusts that have come under the judicial ban.

There is not much of profit to be derived from the study of the opinions of courts in such cases. The questions involved are too large for solution in this way. Courts are necessarily conservative. Where the legislature has established rules within its competence, these must be followed by the Courts. Occasionally a MANSFIELD

or a MARSHALL arises, to advance the law by the breadth and sweep of his judgments; but this is so very occasional that it is negligible.

In fact from the time when Sir Matthew HALE declared judicially that the existence of witchcraft was established by incontrovertible proofs, down to the day of the date of these presents, on all political, governmental and economic questions, the courts have followed, in a kind of reactionary spirit, *longo intervallo*, the advanced and advancing intelligence of their time. So when great questions are worked out through other agencies and elaborated into law, then the courts recognize the results thus obtained. I say they do; but this is not always true. For in many instances, upon strained and retrogressive interpretations of organic law, they hinder and impede efforts at social and political advancement which they are not only unable or unwilling to promote, but which they seem quite incapable of comprehending. This is not to say that they are not the oracles of the law with all that papal infallibility which the most ardent lover of courts and judges can claim for them. Such they are. And the law thus announced must be respected and obeyed.

"What is the law, should, because it is the law, be spontaneously obeyed by the community; or obedience be vigorously enforced by the tribunals of the country. Those who resist the law, and avow and justify the resistance, on the alleged ground that what they are thus opposing is unjust, invade the province of the legislature, by themselves enacting a practical repeal; or rather burst the constitutional and social ties; and return to that rude anarchy from which they had been rescued by the law."<sup>2</sup>

As I understand the Sherman Act, it prohibits all contracts or combinations in restraint of interstate trade, at least where they are of such size and character as to tend to monopoly in that field.

I assume that if there were two great companies which manufactured all the steel rails, beams, plates, etc., that were made in this country in competition with each other, if one bought out the other, one purpose of that transaction being thus to occupy the entire field without competition, this would fall within the condemnation of the act.

To return to a simpler yet by no means remote time, there were say forty years ago two manufacturers making plows in Moline, Illinois. Let it be supposed that they together controlled an extensive trade, not absolutely in any particular territory perhaps, but still to such an extent that on all such matters as prices, terms, etc., they exercised a very potent influence. Neither nor both had a

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<sup>2</sup> Baron Smith in *Knox v. Gavin*, 1 Jones (Ir. Ex.) 190.

monopoly; but each being a strong and successful institution had a large and, except for the activities of the other, practically a controlling influence in a wide field. Now if one, accumulating a surplus a little more rapidly than the other and being a little more aggressive, thus to some appreciable extent drawing away its rival's customers, finally, largely for the purpose of getting rid of a competitor, buys out the other company with usual covenants from its active officers against competitive activity on their part, this is apparently unlawful.

Competition is the life of trade because it is believed to stimulate energetic efforts to secure trade and thus to promote efficiency and to secure reasonable prices.

Now in the case supposed, one of the companies buys out the other largely to secure additional custom. To say that this is unlawful is to check that healthful and energizing spirit which has made our domestic trade and commerce the wonder of the world. It is to strike a fatal blow at that tireless ambition to accomplish all that is humanly possible that has built up those wonderful institutions in manufacture and in trade which are the most distinctive features of our time.

But it is said if such combinations are tolerated, they will have consumers at their mercy, and will charge what they please for their conduct. May be so for a time. But sooner or later men in control of such enterprises will learn that such a course is suicidal.

In the first place it is certain to develop competition. Just now this is prevented in a measure by the Sherman Act. It operates *in terrorem*; and thus combinations already in existence before it was vigorously enforced, enjoy a certain measure of protection from competition which they would otherwise encounter.

In the second place, a far sighted trade policy must be based on the fundamental idea that in all exchanges there must be reciprocal advantage; and that to fix prices, even where there is an absolute monopoly, at an exorbitant figure, so as to oppress and impoverish the consumer, would be a fatal mistake. The constant tendency is, in spite of all efforts to maintain prices, for new methods and increasing efficiency to decrease the cost of production. Necessarily and inevitably the consumer must share in this advantage. The tendency, too, is in great staple lines to do business on close margins. All this is in obedience to the universal impulse to extend and hold trade. A monopoly can hardly be so buttressed and fortified as to be able to ignore these influences. Whenever it does it will invite dissolution.

Constant effort and struggle seem to be the conditions of success

in every department of human activity. Whenever an industry or a trade disregards, in fancied security, this basic elemental fact, it is bound to suffer.

Nations, like individuals, have an organic growth and development, which cannot be ignored by the wise and philosophic legislator. This nation, with inestimable natural advantages, has grown great in material prosperity and resources under the inspiration of liberty. With its wonderful and rapid development there have appeared difficulties and indeed positive evils which seem to call loudly for correction. We live in a utilitarian age which is impatient of abstractions that impede the correction of concrete and conceded wrongs.

The moral sense of the country has been shocked at the outrages committed in great strikes; therefore we take away from those charged with violence in this regard, the right to trial by jury and, by a mere evasion, punish them for contempt of court.

The press of the country has, by its extravagance and frequent disregard of high moral purpose, in large measure lost popular confidence.

So we tolerate, under the guise of punishing for contempt, when a court is criticised, flagrant judicial invasion of the inestimable right of free speech and publication; and similar efforts to suppress unpopular oral discussion pass without general reprobation.

The cost of living has advanced, and many so-called trusts have been guilty of gross extortion and of lawless oppression. So we propose to extirpate *id omne genus*, the whole brood.

Our national faith in the efficacy of legislation is more than religious. Yet it is well to remember that legislation can not accomplish everything. The centralizing tendencies due to modern methods of travel, transportation and communication have, in the life of society, consequences as inevitable as those attending upon the operation of the laws which govern the material universe.

Dr. VANHISE, the very able and scholarly President of the great University of Wisconsin, in his recent work upon this subject, has well said:

"Concentration and co-operation in industry in order to secure efficiency is a world-wide movement.

"The United States cannot resist it. If we isolate ourselves and insist upon the subdivision of industry below the highest economic efficiency and do not allow co-operation, we shall be defeated in the world's markets. We cannot adopt an economic system less efficient than our great competitors, Germany, England, France and Austria. Either we must modify our present obsolete laws re-

garding concentration and co-operation, so as to conform with the world movement, or else fall behind in the race for the world's markets. Concentration and co-operation are conditions imperatively essential for industrial advance; but if we allow concentration and co-operation, there must be control in order to protect the people. An adequate control is only possible through the administrative commission. Hence concentration, co-operation and control are the key words for a scientific solution of the mighty industrial problem which now confronts this nation."

It is idle to attempt to resist the inexorable laws of commerce operating in every quarter of the globe, which tend to compel and justify centralization and consolidation as efficient and economically sound.

In the nature of things nothing of permanent advantage can be accomplished in a governmental contest against economic law.

'The results of efforts at enforcing the Sherman Act have not been impressive. Neither judges nor jurors are generally disposed to convict persons charged with statutory offenses not involving moral turpitude. In the few cases where such convictions have been obtained it will generally be found that there have been accessories in the way of frauds and oppressions practiced by those accused against their competitors, which were not at all within the purview of the act nor indeed necessary to establish its transgression.

These incidents thus wholly collateral have nevertheless furnished the moral basis for a successful accusation of statutory guilt.

Dissolutions of great trusts are decreed, the price of their products is thereupon raised, their securities advance in the markets and their business continues without serious interference or altered character.

Mr. LEE of the Chicago Bar has well characterized these proceedings. "Like the stuffed club and slap-stick of low comedy, their employment is pleasing to the audience and does not injure the victim."

It seems to me that this preposterous statute should be promptly repealed. That accomplished, if our tariff fosters combinations by unwarranted protection of their products, such protection should be promptly withdrawn. Whether further legislation is necessary in the way of regulation seems to me matter of debate.

There can be no question that Congress under its power to regulate commerce between the states and with foreign nations, has

plenary authority over this subject, extending, I make no doubt, even to the regulation of prices. Such an attempt, however, is so repugnant to our essential individualism, our belief in personal liberty, our inborn appreciation of self dependence and self protection in such matters, and the inherent practical difficulties of such an effort are so colossal that it seems to me a solution well nigh impossible. Perhaps we may come to it; but it savors too much of the blight of socialism, that deadening, withering paralysis already threatening the body politic, to make any appeal to me.

Shall we then let the people suffer and indeed suffer with them from these terrible trusts? Our efforts to abate them have thus far proved quite abortive. Possibly, if our statesmen and legislators should suspend their patriotic activities in this field long enough to study the subject carefully, the popular distress might not in the interval be materially aggravated. I would suggest some mild remedies; a large measure of publicity would certainly be wholesome. Let legislation prescribe this and provide methods for securing it. If this were secured, trade associations and combinations might well be permitted.

Mr. A. J. EDDY of the Chicago Bar in his recent volume, *THE NEW COMPETITION*, has treated this phase of the question with great clearness and force. Nor has he failed in his chapter on class legislation to point out, with equal clearness, some of the disturbing elements that make legislative treatment of the trust problem so difficult.

But suppose we do not try artificial remedies for a while, but let nature take its course.

For many years the railways of this country were banded together to resist the reduction of rates. They are still; but former methods were different. They had traffic agreements, percentage pools, commissioners etc., *ad libitum*. Yet rates for passenger and for freight traffic tended constantly downward. This was due to natural law before which the efforts of banded monopoly were ineffectual. This law operates in every field of human activity; it finds its origin in those evolutionary processes on which the progress of the race depends. Everywhere, in every line of service and of production, the tendency is towards increased efficiency and lowered costs. Inevitably the consumer has shared and must share in these advantages.

The intelligence of our legislators is not sufficient to enable them to effectively displace this principle of human activity. Some temporary advantages may seem to follow such efforts at times; but they are illusory and evanescent. For some years English legisla-



tors attempted to exclude cotton, that it might not compete with home grown flax. When it was finally admitted it became one of the greatest sources of profit to the people of that country where it has been manufactured on an enormous scale.

The aggregate intelligence, energy and initiative of individuals engaged in trade and commerce in this enlightened and progressive nation, are far more adequate to dealing with these questions than legislative wisdom; and an enlightened self interest must ultimately recognize that essential community of interest which exists between consumer and producer. Industrial and commercial freedom has made and developed our domestic trade to its present enormous proportions. Should its very greatness and prosperity suggest wanton and lawless aggression upon society, these manifestations may be properly repressed and punished; but it ought not to be put in legislative shackles nor compelled to submit to the control of administrative leading strings. For it is true now as always in the language of a great English statesman, EDMUND BURKE, (like many great Englishmen, an Irishman) that

“Liberty, too, must be limited in order to be possessed. The degree of restraint it is impossible in any case to settle precisely. But it ought to be the constant aim of every wise public counsel to find out \* \* \* with how little, not how much, of this restraint the community can subsist; for liberty is a good to be improved, and not an evil to be lessened.”<sup>3</sup>

S. S. GREGORY.

CHICAGO.

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<sup>3</sup> 2 Works 229.